No. 95-1596

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

GICC CAPITAL CORP.,

Petitioner,

vs.

TECHNOLOGY FINANCE GROUP, INC., ANDREW GRAHAM, DENNIS WILLIAMSON, GRAHAM & WILLIAMSON, GORDON LOCKE, CREATIVE RESOURCES, INC., TFF, INC., APPLE LEASING, INC., JAMES T. PIERCE, WALTER H. PRIME, TFG ACQUISITION CORP. and ARTHUR KRONENBERG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

EUGENE R. SCHEIMAN
Counsel of Record
EDWARD S. FEIG
BAER MARKS & UPHAM LLP
805 Third Avenue
New York, New York 10022
(212) 702-5700

Attorneys for Respondents Andrew Graham, Dennis Williamson, Graham & Williamson, Gordon Locke, Creative Resources, Inc., TFF, Inc., Apple Leasing, Inc., James T. Pierce and Walter H. Prime

QUESTION PRESENTED

Whether the court below engaged in a proper analysis of the facts alleged in Petitioner's complaint, in light of this Court's holdings in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989), when it rejected Petitioner's claims under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (1988) for failure to plead a sufficient "pattern" of racketeering activity.

STATEMENT PURSUANT TO RULE 29.6

There are no parent companies or nonwholly owned subsidiary companies of any of the corporate Respondents represented herein.

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Respondents Andrew Graham, Dennis Williamson, Graham & Williamson, Gordon Locke, Creative Resources, Inc. ("CRI"), TFF, Inc., Apple Leasing, Inc. ("Apple Leasing"), James T. Pierce and Walter H. Prime,[1] respectfully request that the Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-captioned case.

OPINIONS BELOW

The Second Circuit's opinion is reported at 67 F.3d 463 (2d Cir. 1995); however, for the convenience of the Court, all citations to the opinion will be to the opinion attached as an Appendix ("App.") to the Petition.

STATEMENT OF THE CASE

Petitioner seeks to prolong the long and tortuous history of this action by suggesting that the time is ripe for this Court to revisit RICO's "pattern" requirement — without once demonstrating why the decision below should serve as the vehicle for such a daunting task. Originally styled as a securities fraud case,[2] this RICO action has received more than its fair share of judicial scrutiny, having been amended once, dismissed twice, and the subject of two appeals to the Second Circuit.[3] Every fact

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1. Counsel for Respondents Technology Finance Group, Inc. ("TFG"), TFG Acquisition Corp. and Arthur Kronenberg has notified the Clerk of the Court that those Respondents will rely on this Brief to present their opposition to the granting of certiorari.

2. The federal securities claims were dismissed in 1993. Petitioner did not appeal the dismissal of such claims, and sought to rely instead on its RICO claims as the sole basis for federal jurisdiction (which otherwise would not be present).

3. Ultimately, the Court of Appeals denied GICC's Petition for Rehearing and Suggestion of Rehearing *En Banc*.

alleged and legal argument raised by Petitioner herein already has been briefed, argued to and analyzed by trial and appellate courts. The net result has been the decision, based upon the specific allegations of Petitioner's complaint, that Petitioner failed to plead a "pattern of racketeering activity."[4]

The Second Circuit did not create new law in this case. Nor did it disagree with, misapply, or refuse to apply the law of this Court or any other federal appeals court. Instead, the Second Circuit applied the well-developed body of RICO jurisprudence in determining that the specific facts alleged here simply did not satisfy RICO's continuity requirement. That Petitioner is dissatisfied with the lower court's decision is not a basis for this Court to grant certiorari.

Respondents incorporate by reference the statement of facts set forth in the opinion below, in which the Court of Appeals properly accepted as true only the well-pleaded *factual* allegations — and not the unsupported conclusions — contained in the complaint. In that regard, Petitioner's self-serving characterization of the "facts" is both inappropriate and misleading, in that it ignores the deficiency and illogic of its own pleading. As the Court of Appeals recognized, the complaint on its face alleges that the fraudulent conveyance scheme to "strip" TFG of assets to avoid payment of the Note to GICC began, and involved acts which were completed or well under way, *prior* to the issuance of the Note. *See* App. 3a-4a. Thus, Petitioner's depiction of the "scheme" as having initially been conceived and carried on for the purpose of defrauding Petitioner (or anybody) defies logic and constitutes at best mere

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4. While the Court of Appeals affirmed the dismissal of the entire complaint, Petitioner has not been left without an appropriate remedy. It still may pursue its Connecticut state law claims, which were dismissed only on the basis of lack of supplemental jurisdiction.

speculation.[5] This Court should not accept Petitioner's conjectural novelization of "facts" which — as the Court of Appeals correctly determined — is both unsupported by *factual* pleading and inherently implausible.

REASONS FOR DENYING THE WRIT

The Petition is fundamentally flawed in that it assails the Court of Appeals for making holdings never in fact made. Consequently, each argument advanced by Petitioner is based upon a mischaracterization of the decision of the court below. Ultimately, the sole basis for this petition is Petitioner's dissatisfaction with the result it has received: dismissal of its legally insufficient RICO claim.

A proper examination of the Second Circuit's decision below demonstrates that the court simply did not author the far-reaching and expansive holding that Petitioner insists was the case. As a threshold matter, the holding of the court below is expressly limited to the specific allegations presented and is not indicative of a pronouncement of a new rule of law:

> We are not prepared to conclude that *the specific racketeering activities alleged in*

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5. For example, the allegedly "fraudulent" transfer of Apple Leasing to CRI occurred some nine months *prior* to TFG's issuance of the Note to GICC in March of 1990. Pet. 6. Similarly, the allegedly "fraudulent" use by CRI of Apple Leasing, rather than TFG, to repurchase investors' residual interests began *prior* to the issuance of the Note, and long before TFG defaulted on the Note in late 1992. Further, Petitioner's statement of facts fails to note that TFG paid interest for seven months in 1991 pursuant to the Note and then made interest and principal payments pursuant to said Note for an additional eleven months. Such payments totally belie a "scheme" hatched in 1989 to not pay a then non-existent Note.

> *this case*, occurring over less than one year and *without a threat of future criminal activity*, constitute the sort of "long-term criminal conduct" that Congress sought to target in RICO. Accordingly, the judgement of the district court is affirmed.

App. 11a (emphasis added).

As demonstrated below, the court reached that conclusion only after a thorough analysis of the complaint in light of the well-developed body of RICO jurisprudence of this Court and circuit courts of appeals. Contrary to Petitioner's assertions, neither the holding nor any other portion of the decision below contains, espouses or advocates, expressly or by implication, (i) a "one-year bright-line test" for continuity, (ii) a "criminal-civil distinction," (iii) a so-called "timing of the termination" restriction or (iv) any other doctrinal limitation or restriction on RICO claims other than those already endorsed by this Court.

Indeed, prior Second Circuit decisions — including those cited by the court below — confirm that since the decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*,[6] the Second Circuit expressly has refrained from engrafting any hard-and-fast restrictions onto the RICO statute. For example, in *Metromedia Co. v. Fugazy*, the Second Circuit noted that "there is no bright line test for determining precisely what period of time is 'substantial' for purposes of finding the continuity necessary to establish a RICO pattern." 983 F.2d 350, 369 (2d Cir. 1992), *cert. denied*, 113 S.

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6. 473 U.S. 479, 105 S. Ct. 3275 (1985). In *Sedima*, this Court reversed the Second Circuit's decision dismissing a RICO claim for failure to allege a "racketeering injury" and for failure to allege that defendants had been convicted of the predicate acts of mail and wire fraud or of a RICO violation. 473 U.S. at 492-97, 105 S. Ct. at 3283-85.

Ct. 2445 (1993). More recently, in *United States v. Aulicino*, the Second Circuit expressly rejected defendants' argument that "*H.J. Inc.* holds that Congress granted . . . a RICO-free window of opportunity to engage in numerous racketeering acts, provided that they stopped of their own volition after a few weeks or months." 44 F.3d 1102, 1111 (2d Cir. 1995). Even prior to this Court's landmark decision in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893 (1989) ("*H.J. Inc.*"), the Second Circuit expressed its opinion that Congress did not mean "to exclude from the reach of RICO multiple acts of racketeering activity simply because they achieve their objective quickly or because they further but a single scheme." *United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir.) (*en banc*), *cert. denied*, 493 U.S. 811 (1989).

Each of those decisions was cited and followed by the court below. Far from "exemplif[ying] the confusion faced by lower courts" (Pet. 13), the decision below is exemplary of how federal courts have heeded this Court's requirement in *H.J. Inc.* of a flexible, case-by-case and fact-specific approach to civil RICO jurisprudence, and have assiduously avoided espousing any rigid "bright-line" or "black letter" "litmus tests" which would conflict with such an approach.

This is not a case which would have been decided differently but for geography. Petitioner does not point to any ruling of any court which would necessitate a different result. Petitioner trumpets that this Court's prior rulings demand flexibility and a fact-specific analysis of each RICO complaint. Yet, both the District Court and Court of Appeals below employed that approach, albeit in a decision unfavorable to the Petitioner. Not surprisingly, Petitioner complains that the court below was not flexible enough. However, Petitioner fails to point to any ruling below which in any way conflicts either with any other circuit court of appeals or with this Court's suggested approach to

assessing RICO continuity. Instead, the gravamen of Petitioner's argument is that if this Court reviews the complaint and applies a case-by-case fact-specific analysis, it *might* reach a different result. Respondents respectfully submit that such second-guessing is not a proper basis upon which this Court should grant certiorari.

I.

THE DECISION BELOW DOES NOT CONFLICT WITH EITHER THE RICO STATUTE OR THIS COURT'S PRIOR RICO DECISIONS.

Petitioner asserts that the court below espoused a "narrow interpretation" of RICO's "pattern" requirement which conflicts with the statute itself and this Court's construction of the statute. Pet. 14-18. However, this argument — which does not contain a single citation to the decision below — is pure *ipse dixit* and lacks merit.[7] Even a cursory reading of the decision below demonstrates that consistent with *H.J. Inc.*, the Second Circuit (i) properly analyzed continuity both as an "open-" and "closed-ended" concept; (ii) properly applied a multiple-factor test in analyzing open-ended continuity, without limiting the analysis to the question of whether the acts were criminal in nature; (iii) properly observed that since *H.J. Inc.*, courts have considered "a variety of non-dispositive factors" in assessing closed-ended continuity; (iv) properly considered RICO's legislative history and this Court's decisions in *H.J. Inc.* and *Sedima* in noting that "continuity is 'centrally a temporal concept' ";[8] and (v) properly considered prior Second Circuit

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7. Significantly, Petitioner made the same argument to the Court of Appeals in challenging the decision of the District Court. *See* App. 3a.

8. Petitioner's argument that the court below "implicitly ignored" *Sedima* and *H.J. Inc.* (Pet. 15) is symptomatic of its persistent mischaracterization of the decision below.

decisions and decisions of other circuit courts of appeals in determining that the specific facts alleged did not satisfy closed-ended continuity. Petitioner's argument thus ignores the very decision it criticizes.

Most troubling is Petitioner's attempt to downplay the Court of Appeals' determination that the complaint only pled, at most, a pattern spanning eleven months. In arguing that it has alleged a "multi-faceted scheme of fraudulent conveyance activity occurring over a more than two-year period," Petitioner plainly confuses the mere duration of the alleged fraud with the notion of continuity articulated by this Court in *H.J. Inc.* Thus, the critical question is not whether defendants carried out a series of allegedly fraudulent conveyances over a two year period, but rather whether "the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc.*, 492 U.S. at 240, 109 S. Ct. at 2901. Not surprisingly, Petitioner conveniently ignores the fact that the court below properly examined the *predicate acts* themselves, and not simply Petitioner's self-serving attempt to emphasize the longevity of the alleged scheme both prior and subsequent to the alleged fraudulent inducement in 1990. Specifically, the court below rejected Petitioner's attempts to extend the duration of the alleged pattern of racketeering activity by alleging that the scheme began in 1989 — over one year prior to GICC's acceptance of the promissory Note (the non-payment of which allegedly was the focus of the "scheme") — when the CRI defendants took over CRI and Apple Leasing was purchased by CRI from TFG.

First, the court determined that the complaint simply did "not allege any racketeering activity in connection with the CRI defendants' takeover of CRI," and therefore concluded that "the takeover cannot form the starting point of defendants' pattern of racketeering activity." App. 8a. Second, the court concluded that

Petitioner had failed to state a predicate claim of mail and wire fraud in connection with the 1989 purchase of Apple Leasing by CRI from TFG. Again, the court concluded that since the alleged "fraud" involved defendants' failure to disclose this transfer to GICC in 1990, Petitioner could not rely on the date of the transfer in 1989 to extend the duration of the pattern backward in time. App. 8a-9a.

The Court of Appeals thus closely adhered to the teachings of *H.J. Inc.* in concluding that continuity cannot be artificially measured from points in time where no predicate act could be stated as a matter of law. Notably, Petitioner does not — because it cannot — take issue with the Second Circuit's determination that the complaint failed to plead a claim of mail or wire fraud prior to 1990. Petitioner therefore cannot credibly continue to press their view that they have pled a two-year scheme.

Petitioner's argument therefore is reduced to its reliance on RICO's "liberal construction" clause (Pet. 16), and its self-serving conclusion that "the broad requirements of 'pattern' articulated in *Sedima* and *H.J.* are clearly satisfied by GICC's Complaint." Pet. 17-18. Even putting aside that both the District Court and Court of Appeals already have found this very same argument to be unpersuasive, Petitioner's reliance on the RICO statute and this Court's decisions in *Sedima* and *H.J. Inc.* is misplaced. This Court has made it abundantly clear that RICO's broad definition of a "pattern of racketeering activity" is not without its limits, first by introducing the elements of "continuity" and "relatedness" in *Sedima*, 473 U.S. at 496 n.14, 105 S. Ct. at 3285 n.14, and later by articulating a framework for analysis of these concepts in *H.J. Inc.* Of course, *Sedima* is of little precedental value to Petitioner here the Court was not presented with, and therefore did not reach, the question of whether the complaint at issue therein adequately pled a pattern of racketeering activity. And Petitioner's complaint does not

contain allegations remotely approaching the far-reaching six-year bribery campaign at issue in *H.J. Inc.* Neither this Court nor any circuit court of appeals has ever found RICO's continuity requirement to be satisfied based upon specific factual allegations similar to those present here. Contrary to Petitioner's argument, neither the RICO statute nor this Court's precedent requires that RICO be so liberally construed as to encompass Petitioner's pleadings herein.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION.

Petitioner next argues that the decision below "aggravates the existing split of authority within and among the circuit courts." Pet. 18. However, it nowhere identifies the decisions allegedly in conflict, and wholly fails to demonstrate how the decision of the court below conflicts with any other circuit court decision. That is because it does not.

A. No Circuit Court Of Appeals—Including The Court Below—Has Espoused A Bright-Line One-Year Requirement.

Petitioner asserts repeatedly that the court below applied a supposed "one-year minimum requirement" in dismissing the RICO claim for failure to plead requisite continuity, and that such rule purportedly conflicts with decisions of other circuit courts. However, the court below did *not* hold that Petitioner's RICO claim was barred by a supposed "one-year temporal requirement" for closed-ended continuity or, for that matter, by any "bright-line" test of any kind. Indeed, no circuit court of appeals has advocated any such bright- line test. In fact, if there is one thing that all circuit courts agree upon, it is that there can

be no "bright-line" or "litmus test" for determining RICO continuity.

The decision below does not depart from that precedent. The court below advocated and applied a multiple-factor test in examining whether the complaint established closed-ended continuity. The court listed, by way of example, the following "*non-dispositive* factors" to be considered in examining closed-ended continuity:

> the length of time over which the alleged predicate acts took place, the number and variety of acts, the number of participants, the number of victims, and the presence of separate schemes.

App. 8a. The court then examined *each* of those factors, although it first focused on the failure of the pleading with respect to the "temporal aspect" of the claim in view of this Court's observation that "continuity is 'centrally a temporal concept.' " App. 10a (quoting *H.J. Inc.*, 492 U.S. at 242).

Initially, as previously demonstrated, the court below noted that while the complaint conclusorily alleges a pattern spanning two years, proper scrutiny of those allegations reveals that the complaint, at most, sufficiently pleads predicate acts spanning only a period of eleven months. App. 8a-9a. The court then made two observations: First, that since *H.J. Inc.*, the Second Circuit has found closed-ended continuity only twice, and in both cases involving an alleged pattern far exceeding eleven months.[9]

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9. Those two prior decisions involved alleged patterns spanning eight years and two years, respectively. *See Jacobson v. Cooper*, 882 F.2d 717 (2d Cir. 1989) (continuity satisfied by predicate acts occurring from 1980 to 1988); *Metromedia v. Fugazy*, 983 F.2d 350 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993) (jury instruction that "a few weeks or months" might

(Cont'd)

Second, that other circuit courts "have consistently refused to treat predicate acts occurring over a similar (or even longer) period of time a 'pattern of racketeering activity' under RICO." App. 9a (citations omitted). The court then turned to the other factors considered by other circuit courts of appeals and concluded that none weighed in favor of finding continuity based upon the facts alleged. App. 10a-11a.

That the Second Circuit still has not found closed-ended continuity except in cases involving patterns spanning upwards of two years does not demonstrate that the Second Circuit adheres to any "bright-line" temporal rule, much less the one-year rule proffered in the Petition. Indeed, both a prior Second Circuit decision and a recent Ninth Circuit decision (relied upon by Petitioner) preclude such an expansive view of the decision below. First, in *Metromedia v. Fugazy*, the Second Circuit noted that "there is no bright line test for determining precisely what period of time is 'substantial' for purposes of finding the continuity necessary to establish a RICO pattern." 983 F.2d 350, 369 (2d Cir. 1992). The decision below does nothing to change that view, which is shared by the Third and Ninth Circuits. *See Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 611 (3d Cir. 1991) (declining to "set forth a 'litmus test' to measure duration"); *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) (declining to impose a "bright-line, one-year rule" for continuity).

Second, the Ninth Circuit in *Allwaste* expressly cautioned against elevating to the status of binding precedent its prior observation in *Religious Technology Center v. Wollersheim*, that it had "found no case in which a court has held the requirement to be satisfied by a pattern of activity lasting less than a year." 971

(Cont'd)

constitute "a substantial period of time" held harmless error in light of evidence of predicate acts spanning at least two years).

F.2d 364, 366 (9th Cir. 1992). In rejecting an expansive view of its prior decision, the Ninth Circuit in *Allwaste* concluded that:

> [w]e would be misguided, however, if we construed these observations as establishing a hard and fast, bright line, one-year rule. We did not go so far as to establish such a rigid requirement because it would contradict the fluid concept of continuity enunciated by the Supreme Court in *H.J. Inc., supra*.

65 F.3d 1523, 1528 (9th Cir. 1995).

Petitioner offers no reason why the observations of the court below (which are no different from those of the Ninth Circuit or any other circuit) should be viewed as a bright-line rule — other than the obvious tactical goal of manufacturing a supposed conflict among circuits where none exists. For the reasons stated by the Ninth Circuit in *Allwaste*, the Second Circuit's observations below, which Petitioner seeks to raise to the level of a holding, should properly be read as just what they are — observations. In sum, there is no conflict between the decision below and that of any other circuit court on the question of the required duration for closed-ended continuity: *no* court has established any bright-line test. Indeed, had the Second Circuit been persuaded by Petitioner's view of continuity, the decision below would have been the *first* circuit court decision to have found continuity under the facts alleged. Thus, far from creating a conflict, the decision below avoided one.[10]

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10. Finally, Petitioner's suggestion (Pet. 20) that the Second Circuit has somehow endorsed a "RICO-free window" of opportunity is squarely contradicted by its decision in *Aulicino*, in which it expressly *rejected* such a notion. *See infra* n. 14.

B. The Court Below Did Not Impose A "Civil-Criminal Distinction".

Petitioner also is wrong in characterizing the decision below as having "suggested a distinction between civil and criminal RICO cases" (Pet. 22). Petitioner relies on the following excerpt from the court's decision:

> An inherently unlawful act performed at the behest of an enterprise whose business is racketeering activity would automatically give rise to the requisite threat of continuity. . . . Where the nature of the conduct or the enterprise does not by itself suggest that the racketeering activities will continue, courts must look to other external factors.

Pet. 22 (citing App. 6a) (citations omitted).

As a threshold matter, the quoted passage is not the holding of the court below, but rather is unquestionably dictum — as the court below went on to point out, the complaint "does not allege that the nature of the defendants' conduct itself gives rise to a threat of continuity." App. 6a. Further, the court nowhere suggested that open-ended continuity may *only* be established where the predicate acts involve "inherently unlawful" activity. To the contrary, the court emphasized that "courts must look to other external factors," and illustrated this point by discussing two prior Second Circuit decisions in which the requisite "threat of continuity" was shown in the absence of such "inherently unlawful acts" as murder, extortion or embezzlement.[11]

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11. *See* App. 6a, citing prior decisions in *Beauford v. Helmsley*, 865 F.2d 1386, 1392 (2d Cir.) (*en banc*), *vacated and remanded*, 492 U.S. 914, *adhered to on remand*, 893 F.2d 1433, *cert. denied*, 493 U.S. 992 (1989), and *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 521 (2d Cir. 1994).

Thus, the court did not end its analysis of open-ended continuity upon concluding that the complaint did not involve "inherently unlawful acts." The court properly examined the specific factual allegations to determine whether they were "sufficient to suggest a threat of continuity." App. 6a-7a. The court employed precisely the type of "flexible approach" and specific factual analysis endorsed by this Court in *H.J. Inc.*

That the court ultimately found GICC's allegations to be insufficient simply does not support Petitioner's view that the Second Circuit has drawn a distinction between criminal and civil RICO cases. The court's citation to its prior decision in *Aulicino* demonstrates the contrary to be true. In *Aulicino*, the Second Circuit held that a three and a half month kidnapping spree constituted a RICO pattern where the evidence demonstrated that the defendants had plans to commit further kidnappings.[12] Significantly, the *Aulicino* court based its continuity analysis on an extensive discussion of *H.J. Inc.*:

> The *H.J. Inc.* Court stated that a threat of continuity exists, for example, where the predicate acts "include a specific threat of repetition extending indefinitely into the future," . . . or where the acts form "part of a long-term association that exists for criminal purposes," . . . or where the acts constitute "a regular way of conducting [an] ongoing legitimate business,". . . .
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> * * *
>
> The *H.J. Inc.* Court preceded the above

12. We note that Petitioners inaccurately describe *Aulicino* as involving an embezzlement scheme, and wholly overlook the court's extensive discussion of, and reliance on, *H.J. Inc.*

> examples with an express disavowal of "any claim to cover the field of possibilities," . . . stating that it was preferable to "deal with this issue in the context of concrete factual situations presented for decision,". . . . Since Congress intended the courts to take a "flexible approach," . . . the sufficiency of a party's proof of a threat of continuity will "depend[ ] on the specific facts of each case,". . . .

44 F.3d at 1111 (citations omitted).

Thus, the *Aulicino* court drew upon *H.J. Inc.*'s suggestion that a threat of continuity may be established by showing that the enterprise "exists for criminal purposes," and employed the recommended "flexible approach" to conclude that despite the relatively short duration of the pattern at issue, continuity had been demonstrated by proof that defendants had specifically banded together to plan and perpetrate a series of "inherently unlawful acts" — *i.e.*, kidnappings — and evidence suggesting that such kidnappings were planned to continue, and would have continued had the defendants not sensed that their plans were about to be revealed.

Petitioner certainly cannot (and does not) seriously assert that the *Aulicino* court was too rigid in its approach or too narrow in its view of continuity. Nor can it credibly assert that the court below was any more rigid in its approach, as that court notes that the presence of "inherently unlawful acts" is just *one* of the factors to be considered in determining the existence of open-ended continuity. The fact remains, however, that the court below was not faced with allegations of conduct of the type presented in *Aulicino*, and accordingly did not confine its analysis to the nature of the acts alone. Instead, the court properly

employed a flexible analysis in scrutinizing the specific allegations to determine whether a threat of continuity existed. Contrary to Petitioner's suggestion, the court's determination that no such threat was presented under the specific facts alleged simply does not constitute a far-reaching ruling at odds with other circuit court decisions or prior precedent of this Court.[13]

C. The Court Below Did Not Hold That Conduct Which Is Terminated Prior To Suit Cannot Satisfy RICO's Continuity Requirement.

Petitioner advances a third misguided argument in suggesting that the court below imposed a so-called "timing of the termination restriction" in holding that Petitioner's allegations did not establish a requisite threat of continuity. However, this argument is wholly unsupported by either the decision below (which Petitioner fails to cite) or any decision of any other court (including those cited in the Petition).

The court below did *not* hold that continuity cannot be established where an alleged pattern terminates prior to prosecution of suit. Instead, in its discussion of "open-ended" continuity, the court below carefully scrutinized Petitioner's allegations directed toward establishing a threat of continuity. First, the court found "unpersuasive" the Petitioner's argument that "the defendants would have continued to loot TFG if not for the fact that all available funds had already been looted" in light of the inherent terminability of the alleged scheme. App. 6a-7a. As the court observed, "once the pool of investor interests

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13. Finally, Petitioner's reliance on *Sedima* is misplaced. In rejecting a prior criminal conviction requirement in *Sedima*, this Court did *not* hold that the criminal nature of the acts or the enterprise could not be considered as a factor in assessing continuity. Indeed, as demonstrated above, this Court in *H.J Inc.* expressly endorsed consideration of the criminal nature of predicate acts in determining the existence of a threat of continuity.

available for repurchase was exhausted" — a fact admitted by Petitioner — the alleged predicate acts "*could not* have continued." App. 7a (emphasis in original). The court thus determined that as a matter of simple logic, the alleged looting had by its own nature reached an absolute and natural end. App. 7a. Second, the court concluded that Petitioner's additional argument that "CRI would have continued to transfer money overseas had GICC not commenced litigation" was "entirely speculative." App. 7a.

Petitioner argues that these rulings would render civil RICO fraud claims "all but impossible to plead" since, in its view, "if a plaintiff files suit before enough time has elapsed to establish continuity, the threat of continued racketeering activity typically will not exist." Pet. 24. However, Petitioner's argument conveniently ignores that this Court previously addressed this concern by distinguishing between "closed-ended" and "open-ended" continuity in *H.J. Inc.*:

> Often a RICO action will be brought before continuity can be established in this way [*i.e.*, through "long-term criminal conduct"]. In such cases, liability depends on whether the *threat* of continuity is demonstrated.

492 U.S. at 242, 109 S.Ct. at 2902 (emphasis in original).

As demonstrated above, the Second Circuit in *Aulicino* found a requisite "threat of continuity" even where duration was plainly lacking.[14] While the court below was not faced with the

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14. The defendants in *Aulicino* argued that both the short duration of their pattern of conduct and the fact that their activities ended before the prosecution commenced precluded any finding of a requisite threat of continuity. 44 F.3d at 1110. First, the *Aulicino* court expressly rejected the

(Cont'd)

compelling circumstances present in *Aulicino* — *i.e.*, evidence suggesting that additional kidnappings were planned — it nonetheless examined Petitioner's complaint for allegations supporting a threat of continuity before concluding that such allegations were both illogical and speculative.

Petitioner cannot point to any portion of the decision below which suggests that the Second Circuit has departed from its prior *rejection* of the "timing of the termination restriction" in *Aulicino*. Thus, Petitioner's argument should be recognized and rejected as a thinly-disguised attempt to have this Court review the Second Circuit's exhaustive analysis of the complaint's allegations simply because Petitioner is dissatisfied with the outcome below.

D. The Purported "Other Confusing and Conflicting 'Pattern' Tests" Are Not Related To The Decision Of The Court Below.

Petitioner advances a final, catch-all argument intended to illustrate the purported "confusion" among circuit courts concerning various factors used to assess RICO continuity. Petitioner concedes that these "other tests" were not adopted by the court below, but suggests that "[g]ranting certiorari in this

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(Cont'd)
notion of a "RICO-free window of opportunity to engage in numerous racketeering acts, provided that they stopped of their own volition after a few weeks or months." *Id.* at 1113. Second, the *Aulicino* court concluded that despite the short duration, the threat of continuity had been established by the nature of the activities (*i.e.*, a series of planned kidnappings), the "modus operandi" of the kidnapping ring (*i.e.*, posing as police officers, thereby increasing the likelihood that the victims would be murdered to conceal the perpetrators' identities), the fact that the kidnappers had planned, but had not yet attempted, additional kidnappings, and the additional fact that the plan had not terminated of its own design, but rather was abandoned once the defendants sensed that they were about to be exposed.

case can assist other circuits in interpreting what is a 'pattern' under RICO." Pet. 25. Initially, we note that this Court declined to grant certiorari to review several of the decisions relied upon by Petitioner as examples of the supposed "substantial confusion in the lower courts," and Petitioner offers no compelling basis for this Court to do so now, particularly since — as Petitioner concedes — the decision below did not address such issues. In any event, that other circuit courts have considered a multitude of factors in analyzing continuity in disparate factual scenarios serves only to confirm that this Court's advocacy of a flexible, case-specific approach has been adhered to by those courts.

Ultimately, Petitioner seeks to have this Court undertake the monumental task of sorting out the fact-specific holdings of myriad circuit court decisions for the alleged purpose of eliminating confusion. Ironically, accomplishing such a task would also require this Court to do precisely what it has expressly refused to do, and what Petitioner claims is forbidden by the RICO statute itself: *i.e.*, to establish rigid, "bright-line" tests for determining precisely whether a pattern of racketeering activity has been pled. We submit that this Court need not, and should not, undertake such a task, particularly in this case.

In sum, since *H.J. Inc.*, *no* circuit court of appeals has imposed or adhered to any (i) bright-line test for duration, (ii) civil/criminal distinction, (iii) so-called "timing of the termination restriction" or (iv) any other hard-and-fast doctrinal limitation on RICO's pattern element. Thus, there simply are no conflicts for this Court to reconcile, much less conflicts between the decision below and either this Court's prior precedent or any other circuit court rulings. Petitioner's statement of the "question presented here" therefore is purely hypothetical and not ripe for adjudication either generally or as it pertains to this case. Far from "exemplif[ying] the confusion faced by the lower courts," the Second Circuit's decision below exemplifies the

great care and judgment which lower courts have exercised in applying this Court's decisions in addressing the continuing onslaught of RICO actions. Petitioner offers no compelling basis for this Court to prolong this action, and this Court should, therefore, decline to do so.

III.

THE DECISION BELOW DOES NOT CONFLICT WITH THE PRIOR DECISION ON APPEAL.

As a final point, Petitioner attempts to conjure a "conflict" between the Second Circuit's two decisions in this action. Petitioner's argument compares apples with bananas. In the prior appeal in this case, the Second Circuit was faced with a threshold question of whether GICC had proper *standing* to bring a RICO claim, and not whether GICC had properly pled the pattern element. That first appeal was from the District Court's dismissal of the RICO claim on the ground that GICC lacked standing because the alleged looting scheme was not directed at GICC, but only at TFG. The Second Circuit reversed, concluding that GICC's "allegations satisfy the proximate cause requirement for RICO standing." App. 20a. While the court concluded that allegations concerning the timing and magnitude of the Note and "the rapacious nature of the alleged looting" were sufficient to satisfy the "directness of injury required for RICO standing" (App. 20a), the court was not faced with the question of whether such allegations were sufficient to satisfy RICO's pattern element. That the Second Circuit later subjected those same allegations to a proper analysis consistent with this Court's approach to continuity in *H.J. Inc.* and concluded that continuity was not satisfied does not suggest that the court's two decisions stand in conflict, much less that such distinct decisions are "irreconcilable."

Petitioner also asserts that in the second appeal, the Second Circuit "inaccurately" described the alleged pattern and thereby "shortened" it. Pet. 29-30. However, as demonstrated above, Petitioner again misses the point: the relevant inquiry does not turn on the duration of an alleged fraud, but rather on whether a plaintiff has properly pled two or more predicate acts which themselves are related and "amount to or pose a threat of continued criminal activity." *H.J. Inc.*, 492 U.S. at 239, 109 S. Ct. at 2900. The court below therefore did not "shorten" the alleged pattern, but instead determined that GICC had failed to plead any predicate claim of mail or wire fraud prior to March 1990 or after February 1991, and that such alleged pattern did not satisfy RICO's continuity requirement. The flaw therefore does not reside in the Second Circuit's analysis, but rather in GICC's pleading.

CONCLUSION

For all of the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

EUGENE R. SCHEIMAN
Counsel of Record
EDWARD S. FEIG
BAER MARKS & UPHAM LLP
805 Third Avenue
New York, New York 10022
(212) 702-5700
Attorneys for Respondents Andrew Graham, Dennis Williamson, Graham & Williamson, Gordon Locke, Creative Resources, Inc., TFF, Inc., Apple Leasing, Inc., James T. Pierce and Walter H. Prime